Office - Supreme Court, U.S
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ALEXANDER L. STEVAS
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No. 84-760

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1984

ROSE HALL LIMITED,

Petitioner,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

PETITIONER ROSE HALL LIMITED'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

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December 17, 1984

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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ARGUMENT[1]

I. THE FACT ISSUES AND JAMAICAN LAW ISSUES CMOBC RELIES UPON ARE NOT INDEPENDENT GROUNDS PRECLUDING REVIEW HERE, AND CMOBC'S ASSERTIONS ABOUT COMPLEXITY ARE OVERSTATED.

Respondent Chase Manhattan Overseas Banking Corporation ("CMOBC") does not come to grips with the substance of Rose Hall's petition, but it does diligently raise many peripheral and mistaken points. Thus, CMOBC says the Court will find this case "factually tedious" (CMOBC Br. 9), and tries to demonstrate and fulfill this prediction by rehashing many of its failed factual and legal contentions — all rejected as wrong and/or inapplicable by the jury and the courts below (CMOBC Br. 1-6, 16-18).[2]

CMOBC points to this Court's cases permitting an appellee to "rely upon any matter appearing in the record in support of the judgment," as if granting Rose Hall's petition would require this Court to review a welter of other questions resolved adversely to CMOBC by the jury and the courts below (CMOBC Br. 16). A court of appeals does have such a burden, but in the context of its discretionary certiorari power, this Court does not. This Court has jurisdiction to review CMOBC's additional issues if it sees fit, and discretion to deny such review entirely or to remand issues for further proceedings below. *Stern & Gressman, Supreme Court Practice* 483 (5th ed. 1978). Thus, a respondent's mere aggressiveness in rais-

1. Pages i-ii of Petition of Rose Hall Limited for a Writ of Certiorari contain the information required by Supreme Court Rule 28.1.

2. Since Rule 22.5 of this Court limits this brief to arguments CMOBC has first raised in its opposition brief here, Rose Hall does not here discuss its responses to CMOBC's failed contentions. However, it has strong responses to them, as the verdict and the Opinion below demonstrated by rejecting them.

ing side issues and/or meritless arguments need not be rewarded with success in defeating a petition.

Rose Hall's Question Presented No. 3 deals with the Opinion's unprecedented extension of the courtroom immunity (Rose Hall Petition pp. i, 18-30). Not only does CMOBC acknowledge that this question "was fairly presented to the courts below" (CMOBC Br. 7), but it nowhere tries to belittle the importance of the issue, nor does it even try to challenge the merits of Rose Hall's position (Id. at 7-9). All CMOBC says about this question is that it should not be reviewed because of two supposed independent grounds of decision below.

CMOBC is wrong as to both. First, CMOBC says that Jamaican law, which is English commonwealth law, governs the immunity here. CMOBC does not discuss the rulings below that "the liability of CMOBC, as a stockholder, for the wrongs of its subsidiary, is governed by the laws of the United States" (A-24) and that "the United States has a significant policy interest in the application of its law" as to "liabilities of Edge Act corporations" (A-137), nor does CMOBC even mention the Opinion's holding that "if one started with Rose Hall's statement of the [veil-piercing] issue . . . the *American* rule on witness immunity" applies, nor does CMOBC deny that the published Opinion, adopted by the court of appeals, thereby holds that under Rose Hall's asserted understanding of Rose Hall's claim, the *American* immunity rule "precludes this suit as presented" (A-34) (see Rose Hall Petition pp. 7, 13 n.4). Moreover, CMOBC's point is wholly technical, since, as this Court teaches, United States immunity law is the same as commonwealth immunity law (See Rose Hall Petition 13, n.4).

All CMOBC does is point to certain colloquy at argument in the court of appeals, which CMOBC describes as Rose Hall's concession "that the Court of Appeals should 'apply commonwealth law and not United States law . . . on this issue' " (CMOBC Br. 8). This colloquy, while imprecisely phrased, conceded only that if one ac-

cepts the statement of the veil-piercing issue urged by *CMOBC* and adopted in the Opinion — the mistaken characterization of Rose Hall's claim as one "for" fraud on the Jamaican court — one *therefore* applies commonwealth law. Obviously, there was no intention to concede away Rose Hall's position, adopted by the district court in the Opinion, that "if one started with *Rose Hall's* statement of the [veil-piercing] issue . . . the American rule on witness immunity" applies (A-34). Nor was there any intention to concede away Rose Hall's position, insisted on throughout, that Rose Hall's definition of its veil-piercing claim is right, and CMOBC's confused contention that Rose Hall's veil-piercing claim was a "cause of action *for*" the deception of the Jamaican court, is wrong (See Rose Hall Petition pp. 21-23).

Moreover, in Rose Hall's petition for rehearing, *after* the supposed concession, Rose Hall expressly told the court of appeals there was still before it the question "whether the court below correctly applied foreign law as to the purported immunity, when 12 U.S.C. §632 provides the question is governed by 'the laws of the United States' " (CMOBC Br. B-4), thus continuing, despite the supposed concession, to urge that United States immunity law applies.[3] The court of appeals nowhere pur-

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3. The American and commonwealth immunity law are both the common law — they do not materially differ. Rose Hall therefore briefed its argument using authorities from both jurisdictions. For instance, Rose Hall's opening brief in the court of appeals said the district court's application of the immunity was "unsupported by American or commonwealth precedent," noting that "Rose Hall had asserted, and the trial judge had held, that United States law governs 'the question of [CMOBC's] liability for the wrongs of Chase Jamaica" (Rose Hall opening court of appeals Br. 25), and Rose Hall freely cited both American and English immunity authorities (Id. at 24-29). Similarly, Rose Hall's response brief discussed, in some detail, English cases Rose Hall viewed as favorable (Rose Hall court of appeals Response Br. at 14-17), and then argued that "the American [immunity] law is not material ly different from" a leading English case (Id. at 17-18).

ported to give the colloquy CMOBC invokes any significance broader than here explained; it adopted the Opinion, which, as explained above, expressly applied the American immunity rule, and none other, to Rose Hall's claim as defined by Rose Hall. Thus, if this Court adopts Rose Hall's plain and simple proposition that veil-piercing here does not constitute a cause of action "for" false courtroom statements (Rose Hall Petition pp. 21-23), United States law applies, and no Jamaican law issue need be decided to reverse. CMOBC's brief offers no answer to that simple proposition.

As its only other "independent" ground of the decision below, CMOBC relies on what it calls "the *factual* [emphasis CMOBC's] determination that CMOBC did not control the alleged 'fraud' in the Jamaican court" (CMOBC Br. 8) — referring to the Opinion's rejection of the jury's finding that CMOBC did control the deception of the Jamaican court. However, Rose Hall's petition expressly explains that this is not dispositive; control of the deception has nothing to do with Questions Presented Nos. 1 (Edge Act) and 2 (stripping, viewed in itself),[4] nor with Question 3 as presented (Rose Hall Petition p. 27, n. 16). And CMOBC wholly disregards Rose Hall's point that, if this Court did adopt one of the few analyses which might make CMOBC's control of the presentation to the

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4. As to stripping, CMOBC points to Rose Hall's reference to "CMOBC's liquidation of Chase Jamaica" as "irresponsible," being "without so much as a record citation" (CMOBC Br. 16) as if there were a question about CMOBC's involvement in the liquidation of its wholly owned subsidiary Chase Jamaica. As to the deception of the Jamaican court, the Opinion struggled over whether a CMOBC director named Mason was involved, on the obvious premise that if he were involved this would adequately support the jury's finding that CMOBC controlled the deception (A-45-52). As to the liquidation of Chase Jamaica, however, CMOBC conceded below that "it was Mr. Mason who ultimately made the decision to close Chase Jamaica" (Dkt. 770, p. 32).

Jamaican court dispositive, this Court could properly remand that issue to the court of appeals with appropriate instructions (*Ibid.*).

II. ROSE HALL FULLY PRESERVED ITS EDGE ACT ARGUMENT IN THE COURT OF APPEALS.

CMOBC recognizes that Rose Hall's court of appeals briefs duly urged its Edge Act argument, but it says Rose Hall "abandoned the theory altogether" at oral argument (CMOBC Br. 10-11). Not so; CMOBC simply misreads colloquy which had nothing whatever to do with the Edge Act argument. Before the argument, the court of appeals asked counsel to address the issues about Interrogatory 4 to the jury, involving whether the immunity barred veil-piercing in the context of the deception of a court — there was no discussion at argument about the Edge Act. CMOBC's interpretation of the colloquy disregards what was obviously meant, and is only tenuously consistent with what was said. Moreover, the court of appeals nowhere said it understood Rose Hall to concede the Edge Act argument and, to the contrary, it adopted the entire district court Opinion, which discussed and decided the merits of the Edge Act argument (A-95-112).

Rose Hall also made no concession of the Edge Act argument, by using the limited number of pages allowed on petition for rehearing, for other issues — issues the oral argument suggested were central and needed the attention. Rose Hall did not have to file a petition for rehearing at all to preserve its Edge Act argument, which it had duly briefed to the court of appeals.

III. ROSE HALL'S "STRIPPING" ARGUMENT INVOLVES IMPORTANT LEGAL QUESTIONS, AND WAS DULY PRESERVED IN THE DISTRICT COURT.

CMOBC says it is "mystifying that plaintiff seeks 'clarification' of a doctrine [veil-piercing] the application of which . . . requires that 'each case must be considered

on its own facts' " since "a doctrine so closely tied to particular factual circumstances is not a likely candidate for doctrinal 'clarification' " (CMOBC Br. 14-15). Actually, the courts below denied Rose Hall this sensitive analysis of the specific equities, by woodenly applying supposedly inflexible doctrines. For instance, CMOBC here urges the "generally recognized control *requirement* in veil-piercing cases," saying it is "desperate and unprecedented" for Rose Hall to suggest that equitable analysis *can* warrant disregard of entities absent the control CMOBC and the courts below mistakenly said was a prerequisite (CMOBC Br. 9). Similarly, CMOBC's assertions that "there was not a shred of evidence in the record that CMOBC controlled the alleged stripping or received any benefit from it" (CMOBC Br. 15), mistakenly treat those matters as doctrinal prerequisites to the disregard of entities, which they are not (Rose Hall Petition 28-30). These points are not factual but doctrinal. CMOBC's successful assertion of these supposed rigidities (which, while mistaken, have support in some authorities) merits this Court's review, because preserving the actual doctrinal flexibility of veil-piercing has nationwide practical importance.

CMOBC argues that Rose Hall "failed to preserve for appeal" its "broader theory of 'inequity' " (CMOBC Br. 13-14).[5] This is mistaken. The district court initially entered judgment for Rose Hall on the verdict, and in opposing CMOBC's motion for judgment notwithstanding the verdict, Rose Hall was called upon for the first time, to respond to CMOBC's immunity argument. In that setting, Rose Hall duly briefed and argued its broader argument emphasizing the representations to the Jamaican court and the stripping of Chase Jamaica, taken together, and did so again in the court of appeals.

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5. The district court's holding about this was *sua sponte*, and in the court of appeals CMOBC simply cited that holding, offering no argument to support it (CMOBC court of appeals Br. 26).

Rose Hall's petition specifically addresses this supposed failure to preserve the argument (Rose Hall Petition pp. 25-26, n.15), and CMOBC's brief does not directly dispute anything Rose Hall there says. Rather, CMOBC merely says Rose Hall did not request a special interrogatory, or ask for supplemental findings "nor did plaintiff move for a directed verdict or for judgment notwithstanding the verdict on this basis" (CMOBC Br. 14) — simply ignoring Rose Hall's point that such steps were quite unnecessary since, *inter alia*, Rose Hall was *defending* its judgment based on the verdict *as given*.

CMOBC cites no authority that Rose Hall had to do those things, and it plainly did not. Rule 49(a) provides that a party who allows the questions to the jury to omit an issue waives only "his right to a trial *by jury* of the issue so omitted," not its merits; the rule expressly says the court may make a finding on such omitted issues or "shall" be deemed to have done so. The verdict may thus be augmented from the record, and the judgment may also be based on conclusions which are not the jury's finding, but which follow from something the jury did find. *See J. C. Motor Lines, Inc. v. Trailways Bus System, Inc.*, 689 F.2d 599, 602-03 (5th Cir. 1982); *Hudson Rug Refinishing & Cleaning Corp. v. Prime Manufacturing Co.*, 115 F.2d 615, 618-19 (7th Cir. 1940). It follows that a verdict winner's right to make legal arguments opposing a motion for judgment n.o.v., does not depend on having sought jury instructions about them, or on having moved for a directed verdict about them, or even on having previously asserted them at all.[6] Suppose CMOBC

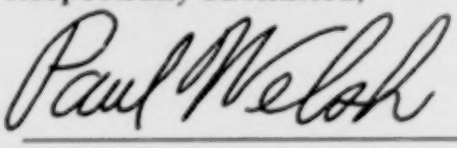
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6. See *International Nikoh Corp. v. H. K. Porter Co.*, 358 F.2d 284, 289-90 (7th Cir. 1966) (Plaintiff pleaded fraud but failed to prove it: unjust enrichment relief granted); *Glen Falls Indemnity Co. v. Golden*, 148 F. Supp. 41, 43 (D.C.D.C.), *aff'd*, 250 F.2d 769 (D.C. Cir. 1957) (same) (Holtzoff, J.); *Henry v. United States*, 424 F.2d 677, 679 (5th Cir. 1970) (plaintiff's False Claims Act theory failed; relief under lesser fraud standard "granted even though not specifically demanded by the pleadings"); Cf. *New Amsterdam Cas.*

had not moved for judgment n.o.v., but immediately appealed Rose Hall's judgment. As CMOBC itself here argues in a different connection, in such an appeal Rose Hall could have relied "upon *any matter appearing in the record* in support of the judgment" (CMOBC Br. 16). It follows that Rose Hall should have been given at least the same latitude to defend its judgment against CMOBC's motion for judgment n.o.v., and that the courts below gravely erred in holding otherwise.

Indeed, the Opinion's *sua sponte* waiver theory, while subsidiary to Rose Hall's Question Presented No. 3, is itself an important question of practice warranting certiorari. The holding below that a Rule 49(a) verdict winner can be mechanically denied the right to modify or refine its position in response to an adversary's argument, newly submitted on motion for judgment n.o.v., is novel, is inconsistent with the policy of the Rules favoring decision of the merits, and is of general importance.

Respectfully submitted,



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NOTES *(Continued)*

Co. v. Waller, 323 F.2d 20, 25 (4th Cir. 1963) (Plaintiff's theory failed; relief granted on different theory "disclaimed by the plaintiff when it sought the whole loaf").